A

Md Nasir Uddin v Public Prosecutor

B

HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATION NO BA-44–107–02 OF 2020
NURULHUDA NUR'AINI JC
10 MARCH 2021

C

Criminal Procedure — Bail — Application for — Accused charged under s 26A Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 — Bail refused under s 13 of the Security Offences (Special Measures) Act 2012 — Whether the court has discretion to permit bail to an accused charged with a security offence — Whether s 13 SOSMA is unconstitutional — Whether s 388 of the Criminal Procedure Code could apply where offences are unbailable

D

The applicant and another person were both charged with two charges of smuggling migrants under s 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the ATIPSOM') which ws to be read with s 34 of the Penal Code. Charges under s 26A are categorised as a 'security offence' under the first schedule of the SOSMA hence by virtue of s 13 of the SOSMA, the applicant was not granted bail. The applicant applied to be released on bail on the basis that the court was vested with the discretion to permit bail by citing *Saminathan a/l Ganesan v Public Prosecutor* [2020] 7 MLJ 681 ('Saminathan'). The applicant contended that that s 13 has been declared as unconstitutional, hence s 388(1) of the Criminal Procedure Code ('the CPC') could be utilised. When making her decision, the learned judicial commissioner (JC) looked at the intention and purpose of the enactment of the SOSMA. She held that the SOSMA was enacted to combat terrorism and since the applicant was charged with a security offence and the situation did not fall under one of the exceptions in s 13(2) of the SOSMA, his bail application was dismissed. Hence, this application by the applicant to be released on bail on the basis that the court was vested with the discretion to permit bail, citing as foundation that: (a) the decision in Saminathan declared s 13 of SOSMA as unconstitutional; and (b) hence, s 388 of the Criminal Procedure Code ('the CPC') is open to be utilised by the applicant.

E

F

G

H

Held, dismissing the application:

I

(1) In *Saminathan*, the HC applied FC decisions and principles enunciated in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4

MLJ 1 and concluded that s 13 of the SOSMA is unconstitutional because it divests from the courts the judicial discretionary power to evaluate whether or not to grant or refuse bail applications. In another case *Raman a/l Shunmugham lwn Pendakwa Raya* [2020] 2 MLJ 675, charged with one count for being a member of the organized crime group Gang 360 Devan, under s 130V(1) of the Penal Code, the COA allowed bail under s 13(2) of the SOSMA upon being satisfied that the applicant accused had chronic diabetes. In *Tamil Selven a/l Letchumenan v Public Prosecutor* [2019] MLJU 1123, the COA equally granted bail under s 13(2) of the SOSMA having been satisfied that the applicant was a 'sick or infirm' person. The two decisions by the COA where bail was granted was based on the exercise of discretion by the court having been satisfied that the accused applicant was a sick or infirm person under s 13(2). After referring to a number of authorities, all of which were relevant on the point of the need to maintain separation of power between the judiciary and Parliament on one hand, and the need to maintain the maxim that certain specific pieces of legislation need to prevail over the more general ones, the final determination on the validity of s 13 of the SOSMA remains uncertain (see paras 12, 22–24, 20 & 36).

(2) Section 2 of the CPC on 'Interpretation' deals with 'bailable' and 'non-bailable' offences. Thus, the immediate and logical deduction is that the bail provision in ss 387 and 388 of the CPC would only concern these two types of offences being bailable or non-bailable. The un-bailable offences are never governed by the CPC hence s 388 ought not to have any application. Un-bailable offences are determined by the respective Act specifically as provided in s 41B of the Dangerous Drug Act and s 12 of the Firearms (Increased Penalties) Act 1971, but not the CPC. The kidnapping offence under the Kidnapping Act 1961 is said also categorised as 'unbailable offence' but there is no specific provision similar to DDA and FIPA that states as such, hence the categorisation would fall back to the CPC under First Schedule under 'Offences Against laws Other than the Penal Code'. The Corrosive and Explosive Substances and Offensive Weapons Act 1958 on the other hand, although carries a lesser imprisonment term than stated in the 1st schedule of CPC, but the said Act has clearly state that the offences to be seizable and non-bailable. The decision in *Chow Lin Choy* seems to be rather confusing as the court relied on the priniciples in non-bailable offences in allowing bail for un-bailable offence perhaps on the ground of art 8 'Equality before the Law'. The decision however may be challenged or questioned on the correctness of the decision for not following the stare decisis principle and adopt the FC and the Supreme Court decisions in *Chew Siew Luan* and *Leong Ying Ming*. In both of these two cases, the apex courts addressed their mind to art 8 'Equality' of the Federal Constitution but found that the maxim *generalibus specialia derogant*

supersedes an individual's right (see paras 43–45).

(3) On s 59A, it was argued by the applicant Maria Chin that the validity and constitutionality of the said section must be considered in the light of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* and another case, I*ndira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* and other appeals, and *Alma Nudo Atenda v Public Prosecutor and another appeal*, all are decisions of the FC which reaffirmed the principle that judicial powers resides in the judiciary under the doctrine of separation of powers and which, according to the cases, cannot be abrogated or removed even by constitutional amendment. In *Maria Chin*'s case, 'the real issue is rather the enforcement aspect, ie limitation on available remedy to an aggrieved party'. It was this issue that this court proposed to explore and to determine if there is any basis for this limitation of remedy (see paras 57–58).

(4) In view that the applicant was charged with a security offence under section 26A of the ATIPSOM and that he did not satisfy any of the exceptions under s 13(2) of the SOSMA, bail was not granted to him. The decisions in *Saminathan* and *Koh Chin Wah* did not bind the court (see para 76).

[Bahasa Malaysia summary

Pemohon dan seorang yang lain telah dituduh kedua-duanya dengan dua pertuduhan menyeludup pendatang di bawah s 26A Akta Anti Pemerdagangan Orang dan Anti Penyeludupan Migran 2007 ('ATIPSOM') yang dibaca bersama s 34 Kanun Keseksaan. Pertuduhan-pertuduhan di bawah s 26A dikategorikan sebagai 'security offence' di bawah jadual pertama SOSMA justeru menurut s 13 SOSMA, pemohon tidak dibenarkan ikat jamin. Pemohon telah memohon untuk dibebaskan atas ikat jamin atas dasar bahawa mahkamah diberikan budi bicara untuk membenarkan ikat jamin dengan memetik kes *Saminathan a/l Ganesan v Public Prosecutor* [2020] 7 MLJ 681 ('Saminathan'). Pemohon menegaskan bahawa s 13 telah diisytiharkan sebagai tidak berperlembagaan, justeru s 388(1) Kanun Tatacara Jenayah ('KTJ') boleh digunakan. Apabila membuat keputusan beliau, pesuruhjaya kehakiman yang bijaksana (PK) melihat kepada niat dan tujuan penggubalan SOSMA. Beliau memutuskan bahawa SOSMA telah digubal untuk membenteras keganasan dan oleh kerana pemohon dituduh kerana melakukan kesalahan keselamatan dan keadaan tersebut tidak termasuk di bawah salah satu pengecualian dalam s 13(2) SOSMA, permohonan ikat jaminnya telah ditolak. Justeru, permohonan ini oleh pemohon untuk dibebaskan atas ikat jamin berdasarkan bahawa mahkamah diberikan budi bicara untuk membenarkan ikat jamin, dengan memetic sebagai asas bahawa: (a) keputusan dalam kes Saminathan mengisytiharkan s 13 SOSMA sebagai tidak berperlembagaan; dan (b) oleh itu, s 388 Kanun Tatacara Jenayah ('KTJ') adalah terbuka untuk digunakan oleh pemohon.

Diputuskan, menolak permohonan:

(1) Dalam kes *Saminathan*, Mahkamah Tinggi telah menggunapakai keputusan-keputusan Mahkamah Persekutuan dan prinsip-prinsip yang disebutkan dalam kes *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 dan *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 dan telah memutuskan bahawa s 13 SOSMA adalah tidak berperlembagaan kerana ia melupuskan kuasa budi bicara mahkamah bagi menilai sama atau tidak untuk memberi atau menolak permohonan ikat jamin. Dalam satu lagi kes *Raman a/l Shunmugham lwn Pendakwa Raya* [2020] 2 MLJ 675, yang dituduh dengan satu pertuduhan kerana merupakan ahli kumpulan jenayah terancang Gang 360 Devan, di bawah s 130V(1) Kanun Keseksaan, MR telah membenarkan ikat jamin di bawah s 13(2) SOSMA setelah berpuas hati bahawa pemohon tertuduh mengalami penyakit diabetes kronik. Dalam kes *Tamil Selven a/l Letchumenan v Public Prosecutor* [2019] MLJU 1123, MR juga memberikan jaminan di bawah s 13(2) SOSMA setelah berpuas hati bahawa pemohon adalah orang yang 'sick or infirm'. Dua keputusan MR di mana jaminan diberikan adalah berdasarkan pelaksanaan budi bicara oleh mahkamah setelah berpuas hati bahawa pemohon yang dituduh adalah orang yang sakit atau kurang upaya di bawah s 13(2). Setelah merujuk kepada beberapa autoriti, yang semuanya relevan berhubung perlunya untuk mempertahankan pengasingan kuasa antara badan kehakiman dan Parlimen di satu pihak, dan perlunya untuk mempertahankan maxim beberapa perundangan tertentu yang perlu mengatasi perundangan am, penentuan muktamad berhubung kesahihan s 13 SOSMA masih tidak pasti (lihat perenggan 12, 22–24, 20 & 36).

(2) Seksyen 2 KTJ berhubung 'Interpretation' adalah mengenai kesalahan-kesalahan yang 'bailable' dan 'non-bailable'. Oleh itu, kesimpulan segera dan logik adalah bahawa peruntukan jaminan dalam ss 387 dan 388 KTJ hanya berkaitan dua jenis kesalahan tersebut yang boleh dijamin atau tidak boleh dijamin. Kesalahan yang tidak boleh dijamin tidak dikawal oleh KTJ oleh itu s 388 spatutnya tidak terpakai. Kesalahan yang tidak boleh dijamin oleh Akta masing-masing secara spesifik sepertimana diperuntukkan dalam s 41B Akta Dadah Berbahaya dan s 12 Akta Senjata Api (Penalti Lebih Berat) 1971, tetapi bukan KTJ. Kesalahan menculik di bawah Akta Penculikan 1961 dikategorikan juga sebagai 'unbailable offence' tetapi tiada peruntukan spesifik yang sama dengan ADB dan ASAPLB yang menyatakan sedemikian, justeru pengkategorian akan terjatuh di bawah KTJ Jadual Pertama di bawah 'Offences Against laws Other than the Penal Code'. Sebaliknya Akta Bahan-Bahan Kakisan dan Letupan dan Senjata Berbahaya 1958,

meskipun membawa tempoh penjara yang lebih kurang daripada yang dinyatakan dalam Jadual Pertama KTJ, tetapi Akta tersebut jelas menyatakan bahawa kesalahan-kesalahan tersebut boleh ditangkap dan tidak boleh diikat jamin. Keputusan dalam kes *Chow Lin Choy* dilihat sebagai mengelirukan kerana mahkamah bergantung kepada prinsip-prinsip dalam keslaahan yang tidak boleh diikat jamin yang membenarkan ikat jamin untuk kesalahan yang tidak boleh diikat jamin mungkin atas alas an Perkara 8 'Equality before the Law'. Keputusan itu bagaimanapun boleh dicabar atau dipersoakan tentang ketepatan keputusan kerana tidak mengikut prinsip stare decisis dan mengguna pakai keputusan-keputusan MP dan Mahkamah Agong dan kes-kes *Chew Siew Luan* dan *Leong Ying Ming*. Dalam kedua-dua kes tersebut, mahkamah tertinggi telah megarahkan minda mereka kepada Perkara 8 'Equality' dalam Perlembagaan Persekutuan tetapi mendapati maksim *generalibus specialia derogant* mengatasi hak individu (lihat perenggan 43–45).

(3) Berhubung s 59A, ia dihujahkan oleh pemohon Maria Chin bahawa kesahan dan perlembagaan seksyen tersebut perlu dipertimbangkan berdasarkan kes-kes *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case*, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*, and *Alma Nudo Atenda v Public Prosecutor and another appeal*, kesemua adalah kes-kes MP yang mengesahkan semula prinsip bahawa kuasa kehakiman terletak pada badan kehakiman di bawah doktrin pengasingan kuasa dan yang mana, menurut kes-kes tersebut tidak dibatalkan atau dibuang oleh pindaan perlembagaan. Di dalam kes Maria Chin, 'the real issue is rather the enforcement aspect, ie limitation on available remedy to an aggrieved party'. Ini adalah isu yang mahkamah ini mencadangkan untuk diterokai dan ditentukan jika terdapat apa-apa asas untuk mengehadkan remedi ini (lihat perenggan 57–58).

(4) Oleh kerana pemohon telah dituduh kerana kesalahan keselamatan di bawah s 26A ATIPSOM dan bahawa dia tidak memenuhi mana-mana pengecualian di bawah s 13(2) SOSMA, ikat jamin tidak diberikan kepadanya. Keputusan-keputusan dalam kes *Saminathan* and *Koh Chin Wah* tidak mengikat mahkamah (lihat perenggan 76).]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (refd)
Che Su binti Daud v PP [1978] 2 MLJ 162 (refd)
Chow Lin Choy v PP [2010] 9 MLJ 813, HC (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)
Ho Huan Chong & Ors v PP [1980] 2 MLJ 289 (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other

appeals [2018] 1 MLJ 545; [2018] 3 CLJ 145, FC (refd)
Jimmy Seah Thian Heng & Ors v PP [2019] 7 MLJ 308; [2018] 9 CLJ 769, HC (refd)
Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 81, FC (refd)
Koh Chin Wah v Public Prosecutor (unreported), FC (not folld)
Leong Siew Hoong v PP [1988] 1 MLJ 396 (refd)
Lim Kian Aik v PP [2021] 9 MLJ 633, HC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750
Mohamad Roslan bin Marjo v PP [2019] 10 MLJ 104; [2019] 4 CLJ 648, HC (refd)
PP v Chew Siew Luan [1982] 2 MLJ 119, FC (refd)
PP v Chu Beow Hin [1982] 1 MLJ 135, FC (refd)
PP v Dato' Balwant Singh (No 1) [2002] 4 MLJ 427, HC (refd)
PP v Goh Chooi Guan [1978] 2 MLJ 169 (refd)
PP v Khairuddin bin Abu Hassan & Anor [2017] MLJU 188; [2017] 4 CLJ 701, CA (refd)
PP v Leong Ying Ming [1993] 1 MLJ 177, SC (refd)
Raman a/l Shunmugham lwn Pendakwa Raya [2020] 2 MLJ 675, CA (refd)
Saminathan a/l Ganesan v PP [2020] 7 MLJ 681, HC (not folld)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526, FC (refd)
Suresh Kumar a/l Velayuthan v PP [2020] 10 MLJ 549; [2020] 4 CLJ 270, HC (refd)
Tamil Selven a/l Letchumenan v PP [2019] MLJU 1123; [2019] 1 LNS 1542, CA (refd)
Velmurugan a/l Paniresilvam v PP [2020] MLJU 1965, HC (refd)

Legislation referred to

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 26, 26A, Part IIIA
Arms Act 1960 s 9(a)
Corrosive and Explosive Substances and Offensive Weapons Act 1958
Criminal Procedure Code ss 387, 388, 388(1), First Schedule
Dangerous Drugs Act 1952 ss 37A, 39B, 41B, 41B(1)
Dangerous Drugs Ordinance 1952 ss 12, 12(2), (3)
Federal Constitution arts 4, 8, 121, 149, 149(1)(a), (1)(b), (1)(c), (1)(e), (1)(f), 160
Firearms (Increased Penalties) Act 1971 ss 8, 12
Immigration Act 1959/63 ss 59, 59A
Internal Security Act 1960 (repealed by Security Offences (Special Measures) Act 2012)
Penal Code ss 13, 34, 130J, 130J(1)(a), 130JB, 130JB(1)(a), 130V(1), 302, 409, Chapters VIA, VIB

Security Offences (Special Measures) Act 2012 ss 13, 13(2), 124L, First Schedule

Rajpal Singh (Rajpal, Firah & Vishnu) for the applicant.
Ho Kwon Ching (Deputy Public Prosecutor, Selangor State Legal Advisor's Office) for the respondent.

Nurulhuda Nur'aini JC:

BACKGROUND

[1] The applicant and another person are charged with two charges of smuggling migrants under s 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the ATIPSOM') read with s 34 of the Penal Code.

[2] Section 26 of the ATIPSOM reads as follows:

> 26A Offence of smuggling of migrants
>
> Any person who carries out smuggling of migrants commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding fifteen years, and shall also be liable to fine, or to both.

[3] The migrants involved are three and five individuals of Bangladesh national respectively. The applicant himself is a Bangladeshi whilst the other accused is a Malaysian.

[4] The said charges are pending for trial before this court. As the said charges under s 26A are one under Part IIIA of the ATIPSOM and categorised as a 'security offence' under First Schedule of SOSMA, by virtue of s 13 of the SOSMA, no bail was granted by the court, hence this application.

[5] Section 13 of the SOSMA provides as follows:

> 13 Bail
>
> (1) Bail shall not be granted to a person who has been charged with a security offence.
>
> (2) Notwithstanding subsection (1) —
>
> (a) A person below the age of eighteen years;
>
> (b) A woman; or
>
> (c) A sick or an infirm person,
>
> charged with a security offence, other than an offence under Chapter VIA of the Penal Code and the Special Measures Against Terrorism in Foreign Countries Act

2015, may be released on bail subject to an application by the Public Prosecutor that the person be attached with an electronic monitoring device in accordance with the Criminal Procedure Code.

[6] The SOSMA legislation itself primarily only governs the processes relating to the trial of security offences (*Saminathan a/l Ganesan v Public Prosecutor* [2020] 7 MLJ 681).

THE APPLICATION AND BASIS

[7] The applicant is applying to be released on bail on the basis that the court is vested with the discretion to permit bail, citing these reasons below as foundation supporting the said application. They are:

(a) the decision by Mohd Nazlan J in *Saminathan a/l Ganesan v Public Prosecutor* [2020] 7 MLJ 681 declaring s 13 of the SOSMA as unconstitutional; and

(b) hence s 388(1) of the Criminal Procedure Code is open to be utilised by the applicant.

[8] The details of the application for this court's determination are:

(a) first, a declaration that s 13 of the Security Offences (Special Measures) Act 2012 ('the SOSMA') is unconstitutional; and

(b) thus, the applicant be released on bail pending the disposal of the main Suit No BA-45SOM-20–12 of 2018.

[9] Having perused the affidavit in support by the applicant, it is further deposed that the applicant has been in Malaysia working for ten years, a breadwinner to his family in Bangladesh and that he is not a flight risk and neither has he been involved in any criminal offence nor has he any criminal record in Malaysia.

IMPORTANT DEPOSITION

[10] What is clear is that the applicant is seeking for him to be released on bail to enable him to continue working here in Malaysia. This court observed that he was arrested in 2018 and the working visa would possibly have expired by now. In addition, nothing was mentioned about the Malaysian individual charged with common intention with him under s 26A of the ATIPSOM.

[11] Be that as it may, this court will proceed to determine if this court is bound by the decision of Mohd Nazlan J in *Saminathan* which would have been applied by the Federal Court in its recent decision in *Koh Chin Wah v*

Public Prosecutor (unreported) decided on 22 December 2020 with the caution that there is no ground of judgment in *Koh Chin Wah* just yet.

Recent cases on SOSMA and treatment by the courts

[12] In *Saminathan*, the High Court applied the Federal Court decisions and principles enunciated in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 (FC) *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 3 CLJ 145 (FC) and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780 (FC) and concluded that s 13 of the SOSMA is unconstitutional because it divests from the courts the judicial discretionary power to evaluate whether or not to grant or refuse bail applications.

[13] In addition, the AG had also made a press statement that the AG is not appealing against the decision in *Saminathan*. In other words, the AG agrees with the said decision. This goes further to undermine the application of s 13 of the SOSMA.

[14] In *Koh Chin Wah,* he was charged under s 26A of the ATIPSOM for trafficking Taiwanese national, Peter Loo Chin Choy, using a Malaysian passport at the Kuala Lumpur Immigration Department on 3 July 2017 (*http://www.freemalaysjatoday.com/cateeory/nation/2020/12/22/after-nearly-4--years-in-lockup-man- charged-with-security-offence-gets-bail/*), V Arsbalagan 22 December 2020. The appellant having failed twice before the High Court and the Court of Appeal in seeking for release pending trial, was successful when the Federal Court allowed the appellant to be released on bail under s 388(1) of the CPC for a sum of RM20,000 in one surety and the passport to be surrendered to court with the appellant to report his presence at the police station every week.

[15] In *Saminathan*, the applicant was charged in the sessions court under ss 130J(1)(a) and 130JB(1)(a) of the Penal Code with, respectively, supporting a terrorist group and with having items associated with that group, in his cell phone. Both ss 130J and 130JB are classified as offences relating to terrorism under Chapter VIA of the Penal Code and came within the ambit of the First Schedule to the Security Offences (Special Measures) Act 2012 ('the SOSMA'). By virtue of s 13 of the SOSMA, bail was not granted by the trial court but was subsequently granted by the High Court.

[16] In *Saminathan*, the applicant is a member of the Melaka state legislative assembly and a member of the State Executive Council. As reported in the MLJ case report, he was one of several persons who have been charged in various

sessions courts in this country with offences relating to terrorism — concerning support for the Liberation Tigers of Tamil Elaam ('LTTE') group.

[17] What can be seen here is that although Saminathan was charged alone, there were many more accused persons charged with the same offence relating to terrorism in supporting the LTTE group.

[18] The High Courts having referred by the session courts on the constitutionality of s 13 of the SOSMA all arising from the same charges, Collin Sequerah J in *Suresh Kumar a/l Velayuthan v Public Prosecutor* [2020] 10 MLJ 549; [2020] 4 CLJ 270 had the opportunity to ventilate on this point albeit the attorney general who appeared in the said matter had indicated that the prosecution was not objecting to the said application. This meant that both parties ie the High Court in *Saminathan* and the AG adopted a common stand that s 13 of the SOSMA is unconstitutional. The honourable AG however submitted that whether bail could be granted on the merits would be an altogether different matter (*Suresh Kumar a/l Velayuthan* at p 277).

[19] The High Court in *Suresh Kumar* had expressed the court's position that *Saminathan* being a High Court decision, does not bind the other High Courts as all are of coordinate jurisdiction. Having delt with the issue, Collin Squerah J came to the conclusion as follows at p 299:

> It is the clear and manifest intention of Parliament that the bail provision in s 13 of the SOSMA is meant to prevail over the more general provisions of bail in s 388 of the Criminal Procedure Code ('CPC'). The reason that the principle of the maxim 'generalia specialibus non derogant' was alluded to here was to emphasise that there are certain specific pieces of legislation designed to prevail over the more general provisions of law and these must be given full effect and the maxim must not be ignored as mere surplusage. It followed therefore that it is s 13 of the SOSMA that is applicable to offences under that Act and not the provisions of the CPC when it comes to bail. In the final analysis therefore, and for reasons expressed, this court respectfully constrained to differ from the decision in the case of *Saminathan Ganesan v Public Prosecutor*.

[20] Coming back to both *Saminathan* and *Suresh Kumar*, having perused the authorities referred to by parties or by authorities cited by both Mohd Nazlan J and Collin Squerah themselves, all of which are relevant on the point of the need to maintain separation of power between the Judiciary and Parliament on one hand, and the need to maintain the maxim that certain specific pieces of legislation need to prevail over the more general ones, the final determination on the validity of s 13 of the SOSMA remains uncertain.

[21] Collin J in an earlier decision in *Jimmy Seah Thian Heng & Ors v Public Prosecutor* [2019] 7 MLJ 308; [2018] 9 CLJ 769, accused charged under

s 130V(1) of the Penal Code for being members of an organised criminal group under Chapter VIB of the Penal Code allowed bail under s 13(2) being satisfied that the accused is a 'sick or infirm person'. In *Jimmy Seah*, there was no challenge to the charge being a security offence under SOSMA.

[22] In another case *Raman a/l Shunmugham lwn Pendakwa Raya* [2020] 2 MLJ 675, charged with one count of being a member of the organised crime group Gang 360 Devan, under s 130V(1) of the Penal Code, the Court of Appeal allowed bail under s 13(2) of the SOSMA upon being satisfied that the applicant accused had chronic diabetes.

[23] In *Tamil Selven a/l Letchumenan v Public Prosecutor* [2019] MLJU 1123; [2019] 1 LNS 1542 the Court of Appeal equally granted bail under s 13(2) of the SOSMA having been satisfied that the applicant was a 'sick or infirm' person. The Court of Appeal said as follows:

> [5] The offence under s 130V(1) of the Code with which the applicant was charged is not bailable: See the First Schedule to the Criminal Procedure Code (CPC). However, s 13(2) of the Security Offences (Special Measures) Act 2012 ('SOSMA'), which is applicable to the present case, gives the court the discretion to grant bail to the following classes of persons:
>
> (a) A person below the age of eighteen years;
>
> (b) A woman; or
>
> (c) A sick or an infirm person.
>
> [6] The reason why we granted bail to the applicant was due to his health condition. The learned DPP, while opposing the application, did not dispute that bail could be granted but cited no authority in support. Nor did learned counsel for the applicant cite any, other than to rely on s 13(2)(c) of SOSMA.

[24] The two decisions by the Court of Appeal where bail was granted was based on the exercise of discretion by the court having been satisfied that the accused applicant was a sick or infirm person under s 13(2).

[25] Without a written judgment in *Koh Chin Wah,* it is unclear if this would mean the Federal Court is now overruling its earlier decision in *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119. It appears that Collin J relied on *Chew Siew Luan* in coming to its decision in *Suresh Kumar*.

[26] In *Chew Siew Luan*, although it concerns the effect of s 41B of the Dangerous Drugs Act 1952 in relation to s 388 of the CPC, the principles enunciated in *Chew Siew Luan* by the Federal Court would have the same repercussion as s 13 of the SOSMA.

[27] Section 41B(1) of the Dangerous Drugs Act ('the DDA') provides:

> (1) Bail shall not be granted to an accused person charged with an offence under this Act —
>
> (a) where the offence is punishable with death; or
>
> (b) where the offence is punishable with imprisonment for more than five years; or
>
> (c) where the offence is, punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.
>
> (2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

[28] Raja Azlan Shah CJ (Malaya) in *Chew Siew Luan* said as follows:

> The Dangerous Drugs Act 1952 (Revised — 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, inter alia, dangerous drugs, and 'to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith'. In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that s 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act 1978 (Act A426) and became operative on 10 March 78. *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law (see also *Public Prosecutor v Chu Beow Hin* [1982] 1 MLJ 135 137). The provisions of s 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.
>
> It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in s 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must *ex necessitate* yield to the specific provisions of section 41B of the Dangerous Drugs Act in that regard.

[29] In the *Chew Siew Luan*, the case of *Public Prosecutor v Chu Beow Hin* [1982] 1 MLJ 135 was followed that clearly set the principle on interpretation

of statues and the role of the judiciary as follows:

> The first task of the court is to find out the intention of Parliament and the words of a statute speak the intention of Parliament. 'And in so doing it must bear in mind that its function is jus dicere, not jus dare: the words of a statute must not be overruled by the judges, but reform of the law must be left in the hands of Parliament' (Maxwell on *Interpretation of Statutes*, 12th Ed pp 1–2).
>
> The Price Control Act was passed with the purpose of controlling the price of goods. It has discernible public policy for its object. It is unique in this respect and therefore the scope of its operation is clear. In order to discover the intention of Parliament it is therefore proper that the court should read the Act as a whole, inform itself of the legal context of the said Act, including Acts in pari materia which may throw some light on its meaning, and of the factual context, such as the mischief to be remedied.
>
> In order to ascertain the intention of Parliament, the learned judge has referred to phrases which have been used in other statutes which have fundamentally the same social objectives. In our opinion, that is a safe guide as an extrinsic aid to the construction of a statute, but in the last resort, we think that these statutes turn upon the provisions of the legislation in question and are therefore of relatively little assistance.
>
> The decision of the learned judge rested on the basis that there is no express provision regarding forfeiture. That seems to us to involve implying something wholly inconsistent with the words expressly used in section 14(2)(b). His reasoning really amounts to performing a surgical operation on the enacting words of the subsection by restricting its meaning. 'If there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used.* (See in *re a Debtor* [1948] 2 All ER 533). In our opinion, what should be a fundamentally simple case has been confused and obscured beyond all proportion.
>
> We take the view that the enacting words of s 14(2)(b) are not only very clear, but they are also direct.

[30] This court is of the view that the same confusion arose in *Chow Lin Choy v Public Prosecutor* [2010] 9 MLJ 813 where the judicial commissioner allowed bail to the applicant who was charged with a s 39B of the DDA offence. The reason why bail was given as extracted from the judgment is as follows:

> [13] Pada pandangan saya prinsip-prinsip yang sama yang telah diputuskan di atas bagi kes-kes melibatkan tafsiran s 41B Akta Dadah Berbahaya 1952 juga terpakai dalam kes-kes yang melibatkan tafsiran terhadap s 12 Akta Senjata Api (Penalti Lebih Berat) 1971, termasuklah kes di hadapan mahkamah sekarang. Walau apapun peruntukan yang terdapat sama ada di bawah Akta Dadah Berbahaya mahupun di bawah Akta Senjata Api tersebut pada hemat saya apa yang lebih penting kesemuanya yang ada tidak boleh mengatasi Perlembagaan Persekutuan oleh kerana ianya adalah undang-undang tertinggi negara. Perkara yang menarik

perhatian saya adalah terhadap perkara 5 dan perkara 8 yang berkaitan dengan keadilan sejagat dan kesamarataan.

[31] The JC in the earlier passage elaborated on this point as follows:

[6] Seksyen 12 Akta 37 memperuntukkan dengan jelas bahawa semua kesalahan di bawah Akta itu tidak boleh diberi jamin tanpa mengira mana-mana peruntukan undang-undang bertulis yang lain serta tanpa mengira prinsip undang-undang yang berlawanan. Peruntukan s 12 tersebut berbunyi:

> 12 No bail to be granted in respect of offences under this Act
>
> (1) Bail shall not be granted to an accused person charged with an offence under this Act.
>
> (2) The provisions of subsection (1) shall apply notwithstanding any other written law or any rule of law to the contrary.

[7] Tiada terdapat peruntukan yang serupa di bawah Akta Senjata 1960 yang menghalang jaminan diberikan kepada tertuduh sepertimana s 12 Akta 37 tersebut,

[8] Kesalahan di bawah s 8 Akta Senjata Api (Penalti Lebih Berat) 1971, jika sabit kesalahan hendaklah dihukum penjara maksima sehingga 14 tahun dan juga dikenakan hukuman rotan tidak kurang daripada enam sebatan. Manakala bagi kesalahan di bawah s 8(a) Akta Senjata 1960 pula, jika sabit kesalahan boleh dikenakan hukuman penjara sehingga maksima tujuh tahun atau dikenakan hukuman denda tidak melebihi sepuluh ribu ringgit atau kedua-duanya sekali. Berdasarkan kepada Jadual Pertama kepada KPJ, bagi kesalahan-kesalahan di luar Kanun Keseksaan yang mana hukuman yang ditetapkan boleh membawa hukuman mati atau hukuman penjara melebihi tujuh tahun, kesalahan-kesalahan tersebut adalah kesalahan-kesalahan yang tidak boleh dijamin (*not bailable*). Begitulah juga berdasarkan kepada s 12 Akta 37 tersebut, pertuduhan pertama terhadap tertuduh dalam kes ini adalah satu kesalahan yang tidak boleh dijamin. Oleh itu nampaknya kedua-dua pertuduhan yang dihadapi oleh tertuduh adalah kesalahan- kesalahan yang tidak boleh dijamin. Walaupun kesalahan- kesalahan tersebut tidak boleh dijamin namun mahkamah mempunyai budi bicara dalam keadaan-keadaan tertentu untuk membenarkan jaminan sebagaimana diperuntukkan di bawah s 388 KPJ (lihat kes *Lim Kiap Khee v Public Prosecutor* [1988] 1 MLJ 198; [1987] 2 CLJ 442 dan kes *Public Prosecutor v Goh Chooi Guan* [1978] 2 MLJ 169).

[32] The JC further ventilated the reasons to allow bail and found them to be as follows:

[16] Tertuduh telah mengemukakan kepada mahkamah ini rekod-rekod perubatan beliau dari Hospital Pakar Pantai serta Hospital Universiti. Walaupun umur tertuduh dan keadaan fizikal beliau tidak setua dan 'fragile' seperti Dato' Balwant Singh, namun beliau telah menunjukkan kepada mahkamah bahawa beliau perlu kerap mengambil ubat melaiui suntikan dan beliau akan menghadapi kesukaran untuk berbuat begitu sekiranya ditahan.

[33] The JC in that same paragraph of his judgment, relied on two authorities which allowed the release of the accused charged with 'unbailable offence' on bail (unbailable offence as specifically provided by the respective iaw examples: s 41B of the Dangerous Drugs Act 1952 and s 12 of the FIPA). The first is the case of *Che Su binti Daud v Public Prosecutor* [1978] 2 MLJ 162 charged under s 39B of the DDA where bail was granted to allow the accused mother to breastfeed her younger baby and the case of *Public Prosecutor v Goh Chooi Guan* [1978] 2 MLJ 169 (firstly, the sixth accused was arrested on 24 September 1975 and was first produced in court on 25 September 1975. The first charge preferred against him under s 8 of the Firearms (Increased Penalties) Act 1971, carries a maximum penalty of imprisonment which may extend to 14 years and with whipping with not less than six strokes. The second charge under s 9(a) of the Arms Act 1960 carries a penalty of imprisonment for a term not exceeding seven years or to a fine not exceeding $10,000 or to both such imprisonment and fine. The charges, especially the first, are serious. Secondly, the accused has been remanded in custody ever since arrest and though allowed bail at one stage on 30 December 1975, was again remanded in custody when the bailors were discharged on 22 February 1976 until now) charged under s 8 of the Firearms (Increased Penalties) Act 1971 where the accused was remanded since arrest but was out on bail for a short while before remanded once more upon bailors discharging themselves.

[34] In *Goh Chooi Guan,* no reason was highlighted as to why he was out on bail for a short while, unlike *Che Su*'s case. The case of *Goh Chooi Guan* was reported on other point being whether a judge who was on transfer as a DPP can still proceed to hear his part heard. There was no further discussion in *Goh Chooi Guan* on the issue of bail hence to say it is a good precedent to follow as to why the court resorted to granting bail for that short period is highly questionable.

[35] In *Che Su*'s case, at the time when the accused was charged at the sessions court on 5 March 1978, s 41B of DDA was yet to be enforced although the decision by Gunn Chit Tuan J was dated 14 March 1978. Section 41B came into effect by way of Act A426 (Dangerous Drugs (Amendment) Act 1978 on 10 March 1978 (Amending law Short title In force from Act A426 Dangerous Drugs (Amendment) Act 1978 10 March 1978):

> Section 6. New s 41B as follows:
>
> The Ordinance is hereby amended by inserting immediately after section 41A thereof a new section 41B as follows:
>
> No bail to be granted in respect of certain offences.
>
> 41B. (1) Bail shall not be granted to an accused granted person charged with an offence under this Ordinance respect —

A (a) where the offence is punishable with death; or

(b) where the offence is punishable with imprisonment for more than five years; or

(c) where the offence is punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail
B to the accused person.

(2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

C There was equally no discussion on the effect of s 41B in relation to s 388 of the CPC. As s 41B was not referred to (perhaps rightly so as it is an amendment of substantive in nature and not merely procedural that it can be of retrospective effect), rightly so the trafficking charge at that point in time would be one of non-bailable offence and ss 388 or 389 would still be applied.

D

[36] In addition to *Goh Chooi Guan,* the learned JC in *Chow Lin Choy* also referred to the case of *Lim Kiap Khee*. In *Lim Kiap Khee,* it concerns a charge of s 409 of the Penal Code which is a non-bailable offence and *not one of unbailable offence*. Rightly so, the court is vested with the discretion to allow
E bail subject to proof by the accused applicant to satisfy the court to exercise its discretion.

[37] The case of *Public Prosecutor v Dato' Balwant Singh (No 1)* [2002] 4 MLJ 427 is a murder case charged under s 302 of the Penal Code and again is
F a non-bailable offence. Thus, the CPC permits the exercise of discretion by the court to permit bail.

[38] Coming back to *Chow Lin Choy*, reference was also made to the case of *Ho Huan Chong & Ors v Public Prosecutor* [1980] 2 MLJ 289 where Ajaib
G Singh J in discussing s 41B of the DDA said as follows:

> The provisions of s 41B of the Dangerous Drugs Ordinance are of serious nature. They deprive a person of his liberty so that it becomes the duty of the court to see that the conditions under which an accused person is to be refused bail are strictly followed. It is true that on the face of it as the charge stands in the present case bail
H is not to be granted. But where bail for any offence is disallowed by law under certain circumstances, such as those found in s 41B of the Dangerous Drugs Ordinance, then the court is perfectly entitled to inquire further into the matter and satisfy itself whether any condition precedent to the disallowing of bail has been fulfilled.

I

[39] In *Ho Huan Chong,* the real issue is whether the s 39B charge was properly framed before the court as the chemist was yet to determine the exact amount of the drugs involved, thus the court question the DPP how it could be ascertained that the charge of trafficking was rightly framed. This was what

Ajaib Singh J ventilated in coming to his decision to allow bail:

> (a) where the granting of bail is dependent on the quantity of any dangerous drug then the exact amount of this dangerous drug which was to be stated in the charge assumed great importance. The prosecution should therefore refrain from mentioning the amount of the drug if the prosecution was not in a position to ascertain the exact amount of the drug when an accused person was first charged in court. Otherwise the charge need not state the quantity of the drug concerned and if there was no other valid reason why bail was not granted the accused should be offered bail;
>
> (b) in this case the provisions of section 41B could not be invoked because the relevant condition in subsection (1)(b) of section 41B had not been strictly fulfilled.

[40] As it turned out, the chemist's report was made available to the learned magistrate on 12 February 1980 wherein the amount of heroin was stated to be 4.22g out of the total of 7.4g of the powdery substance. The prosecution thereafter amended the charge to one under s 12(2) and punishable under s 12(3) of the Dangerous Drugs Ordinance 1952 (at p 290).

[41] KC Vohrah J however had a different view in *Leong Siew Hoong v Public Prosecutor* [1988] 1 MLJ 396 and this is what he said (at p 398):

> What is the offence the accused is charged with?' He is charged with the offence of 'trafficking' in a dangerous drug, heroin, an offence punishable, under s 39B(2), with death. Given the definition of 'trafficking' in s 2, it does not matter in what amount of the dangerous drug an accused is charged with trafficking — it is trite law that if he trafficked in one gram of dangerous drug, the sentence is still death.
>
> Since the offence he has been charged with under the Act is punishable with death, then it falls within the provisions of s 41B(a) of the Act that bail shall not be granted to an accused person charged with an offence under the Act where the offence is punishable with death.

[42] KC Vohrah decision means that the determining point is the offence the accused is charged with and not the net weight of the drugs that would eventually be. The subsequent decision of the Supreme Court in *Public Prosecutor v Leong Ying Ming* [1993] 1 MLJ 177 presided by Hamid Omar LP where Gunn Chit Tuan (who sat in *Che Su*'s case as High Court judge) was also in the said panel. The Supreme Court unanimously agreed with the decision of the Federal Court by Raja Azlan Shah CJ (Malaya) in *Chew Siew Luan* and held that a s 39A(2) charge is equally covered in the s 41B ban against bail and said as follows:

> We have perused the notes of proceedings recorded in the court beiow and note that unfortunately the Federal Court case of *Public Prosecutor v Chew Siew Luan* was not brought to the learned judge's attention. Otherwise he would have been aware of the judgment in that case. In any case, we are of the view that the words used in s 41

B(1)(b) are clear and that the words 'punishable with imprisonment for more than five years' mean imprisonment from five years and one day upwards up to imprisonment for life. Then, when we turn to s 39A(2), we consider that the words 'be punished with imprisonment for life or for a term which shall not be less than five years' are also clear and unequivocal and mean that the offence is punishable with imprisonment for more than five years, ie five years and one day up to a maximum of imprisonment for life. That being so, an offence under s 39A(2) of the Act clearly comes within the ban imposed by s 41B(1)(b) of the Act and therefore no bail can be granted in respect of such an offence. It follows that in this case, the offence for which the respondent was charged was not bailable under the specific provisions of the Act and that the learned judge should not have granted bail in this case.

The offences under the Criminal Procedure Code ('the CPC')

[43] Section 2 of CPC on 'Interpretation' deals with 'bailable' and 'non-bailable' offence. Thus, the immediate and logical deduction is that the bail provision in ss 387, 388 of the CPC would only concern with these two types of offences being bailable or non-bailable. The un-bailable offences are never governed by CPC hence s 388 ought not to have any application.

[44] Un-bailable offences are determined by the respective Act specifically as provided in s 41B of the Dangerous Drugs Act and s 12 of the Firearms Increased Penalty Act, but not the Criminal Procedure Code. The kidnapping offence under the Kidnapping Act is said also categorised as 'unbailable offence' but there is no specific provision similar to DDA and FIPA that states as such, hence the categorisation would fall back to the CPC under the First Schedule under 'Offences Against Laws Other than the Penal Code'. The Corrosive and Explosive Substances and Offensive Weapons Act 1958 on the other hand, although carries a lesser imprisonment term than stated in the First Schedule of CPC (imprisonment of between five to ten years and whipping for certain offences) but the said Act has clearly state that the offences to be seizable and non-bailable.

[45] The decision in *Chow Lin Choy* seems to be rather confusing as the court relied on the principles in non-bailable offences in allowing bail for un-bailable offence perhaps on the ground of art 8 'Equality before the Law'. The decision however may be challenged or questioned on the correctness of the decision for not following the *stare decisis principle* and adopt the Federal Court and the Supreme Court decisions in *Chew Siew Luan* and *Leong Ying Ming*. In both the above cases, the apex courts as a matter of fact addressed their mind to art 8 'Equality' of the Federal Constitution but found that the maxim *generalibus specialia derogant* supersedes an individual's right.

[46] This, having been referred to the proviso in s 388 of the CPC in both

the cases, which was absent from s 41B of the DDA, Raja Azlan Shah CJ (Malaya) said as follows:

> It would be erroneous to apply expressions used and provisions made in a statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object. On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in s 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must exnecessitate yield to the specific provisions of s 41B of the Dangerous Drugs Act in that regard.

[47] Furthermore, Hamid Omar FCJ who earlier sat as High Court judge in *Chew Siew Luan* and dismissing the appeal by the public prosecutor against the decision of the session court in allowing bail under s 388 of the CPC despite s 41B of the DDA, subsequently in *Leong Ying Ming* adopted Raja Azlan Shah CJ (Malaya)'s decision of the Federal Court in *Chew Siew Luan*.

[48] Now with that in mind, comes the issue as follows:

(a) first: whether the apex court decisions in *Chew Siew Luan* and *Leong Ying Ming* have been referred to by the High Court judge in *Saminathan*;

(b) secondly: if the answer is 'no', whether a different decision would have been arrived at by the judge if these cases were referred to;

(c) thirdly: have these decisions been over ruled by the latest decision of the Federal Court in *Koh Chin Wah*; and

(d) fourth: whether the principle in *Dalip Bhagwan* [1998] 1 MLJ 1 applies and hence this court is bound by the said decision in *Koh Chin Wah.*

[49] To begin with, despite the latest decision by the Federal Court in *Koh Chin Wah* and other cases, the rule of natural justice still requires parties to be given the right to be heard.

Recent development of the apex court decisions

[50] In a recent decision by the Federal Court in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750, the critical issues in *Maria Chin* relevant as decided principles towards the determination of the issues in the present case are:

(a) a declaration that the respondents cannot act under s 59 of the Immigration Act 1959/63 to deny the appellant a right to natural justice as this is in violation of the Federal Constitution in particular art 160 read together with art 4 of the Federal Constitution and relevant case law;

(b) a declaration that the following provisions of the Immigration Act 1959/63 are unconstitutional:

(i) s 59 which excludes the right to be heard; and/or

(ii) s 59A which excludes judicial review.

[51] On s 59A, it was argued by the applicant *Maria Chin* that the validity and constitutionality of the said section must be considered in the light of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Huiu Langat and another case*, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* and *Alma Nudo Atenza v Public Prosecutor and another appeal*, all are decisions of the Federal Court which reaffirmed the principle that judicial power resides in the judiciary under the doctrine of separation of powers and which, according to the cases, cannot be abrogated or removed even by constitutional amendment.

[52] Interestingly, the real issue in all these cases including the present case before this court boils down to one: the doctrine of separation of power. The majority decision in *Maria Chin* distinguished the cases above stating that not only the facts in *Semenyih Jaya* and *Indira Gandhi* are different from the facts in *Sugumar Balakrishnan*, the constitutional and/or legal issues raised were also different.

[53] As to *Alma Nudo Atenza*, the Federal Court in *Maria Chin* said that the case concerns the constitutionality of s 37A of the Dangerous Drugs Act 1952 and not a case on the constitutionality of ouster clauses, although there are passages in the judgment that give the impression that Parliament has no power to destroy the 'basic structure' of the Federal Constitution and that the courts can prevent that from happening.

[54] In the analysis of the majority decision of the Federal Court in *Maria Chin,* it is art 121 that gives s 59A of the Immigration Act its life by virtue of its creation by the federal law. This is what the majority says:

> [527] In *Liyanage v The Queen* [1967] 1 AC 259 the Privy Council observed, inter alia, that powers in countries with written constitutions must be exercised in accordance with the terms of the constitution from which the powers were derived but of course no validity should be given to acts which infringe the constitution. Section 59A of the Immigration Act must be read in that light and in that spirit.
>
> [528] Clearly, it is a term of art 121(1) of the Federal Constitution that the

jurisdiction and powers of the courts are 'as may be conferred by or under federal law'. In the context of the present case, that 'federal law' is s 59A of the Immigration Act. Thus, federal law has determined that the jurisdiction and powers of both High Courts in immigration matters are only to adjudicate on procedural non-compliance and not on the substantive decision of the decision maker. Both the High Court of Malaya and the High Court of Sabah and Sarawak have no jurisdiction to travel outside the confines of that power.

[529] For the two High Courts to ignore the limitations imposed by s 59A of the Immigration Act in the name of separation of powers and judicial independence is to defy art 121(1) of the Federal Constitution, which the two High Courts are not at liberty to do. Salleh Abas LP in *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamed* [1987] 1 MLJ 383; [1987] 1 CLJ 40; [1987] CLJ Rep 168 once said:

> The courts have a constitutional function to perform and they are the guardian of the constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the state and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.

[55] It is very important for this court to again repeat what was agreed and accepted by the majority of the Federal Court in *Maria Chin*, having agreed with the decided authority in UK on a similar issue, at p 35 as follows:

[530] Given the clear language of s 59A of the Immigration Act and on the strength of the supporting authorities cited by the respondents, including Sugumar Balakrishnan, I accept the following arguments by the learned Senior Federal Counsel as stating the correct position of the law:

(i) Parliament can depart from the general law or fundamental principles such as natural justice by expressing its intention with irresistible clearness: *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252. Rules of natural justice regulating the exercise of statutory power may be excluded by plain words of necessary intendments: *Annets v McCann* (1990) 170 CLR 596. Courts are generally willing to find evidence of the intended exclusion of natural justice: *Brettingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509; *Pearlberg v Varty (Inspector of Taxes)* [1972] 2 All ER 6; *Furnell v Whangarei High School Board* [1973] AC 660; and

(ii) To ascertain whether the plain words of a statute connote the necessary intendment, it is only necessary to pay close attention to the relevant statute: *SZBEL v Minister for Immigration and Multicultural and Indigenuous Affairs* (2006) 228 CLR 152; *Kioa v West* (1989) 159 CLR

> 550. The conferral of an unconditional discretionary power to a public authority suggests that natural justice is not intended to apply: *Salemi v McKellar [No 2]* (1977) 137 CLR 396.

> [531] Section 59A of the Immigration Act has expressed with irresistible clearness the intention of Parliament to exclude judicial review on the decision made by the Minister, the Director General, and, in the case of Sabah and Sarawak, the State Authority.

> [531] The recent decision of the UK Supreme Court in *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22 (Privacy International) drives home the point in the clearest of terms. One of the questions posed for the determination of the court in that case was whether Parliament might by statute 'oust' the supervisory jurisdiction of the High Court to quash the decision of an inferior court or statutory tribunal of limited jurisdiction, a question that is similar in pith and substance to the question posed in relation to section 59A of the Immigration Act. It was decided by majority (Lord Carnwath, Lady Hale and Lord Kerr) that:

> > ... *Judicial review can only be excluded by 'the most clear and explicit words'* (Cart, para 31). If Parliament has failed to make its intention sufficiently clear, it is not for us to stretch the words used beyond their natural meaning. It may well be that the promoters of the 1985 Act thought that their formula would be enough to provide comprehensive protection from jurisdictional review of any kind. (Emphasis added.)

[56] This stand is not new as a similar stand was taken by the Federal Court in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81 where the judgment by Steve Shim CJ said at p 93 that judicial review which is essentially a creature of common law can be excluded by statutory legislation if the words used are unmistakably explicit.

[57] The Federal Court by majority in *Maria Chin,* upon reverting to the history commencing from the Reid Commission and the drafting of the Federal Constitution, came to this most important finding as follows:

> [539] The net effect of omitting the entire draft art 2 on enforcement of rights is obvious, that there is no 'guaranteed' 'constitutional right' to a perceived 'unhindered access' to a court of law seeking for 'full remedy'. In other words, the type and extent of remedy available is a matter for the legislature to decide.

> [400] The Reid Commission quite evidently did not consider the issue as having any adverse effect on judicial power. Instead, by deferring their resolution to 'ordinary law', it shows that the real issue is rather the enforcement aspect, ie limitation on available remedy to an aggrieved party. This is the context in which the limitation on the court's power of review under s 59A of the Immigration Act must be understood.

> [401] In the result, federal law may prescribe what the legislature considers as 'sufficient remedy' to meet the demand of the circumstances. The very act of

prescribing a remedy by federal law, without more, does not amount to an act calculated to jeopardise the due exercise of judicial power.

[58] As extracted from the judgment in *Maria Chin* quoted above, 'the real issue is rather the enforcement aspect, ie limitation on available remedy to an aggrieved party', it is this issue that this court now proposed to explore, and to determine if there is any basis for this limitation of remedy.

Limitation of remedy: Parliament makes law based on available policy

[59] This court will now examine if the limitation to the available remedy in SOSMA is sufficient to meet the demand of the circumstances. SOSMA as enacted under art 149 of the Federal Constitution centred on addressing action or actions by a substantial body of persons with the effect of causing fear or organized violence against persons or property; excite disaffection against the Yang di-Pertuan Agong; or action(s) which is prejudicial to public order or the security of the Federation or any part thereof. From the name of the Act itself 'Security Offences (Special Measures)' and the list of offences identified to be 'security offences' in the First Schedule.

[60] The constitutionality of SOSMA has been acknowledged by the Court of Appeal in *Public Prosecutor v Khairuddin bin Abu Hassan & Anor* [2017] MLJU 188; [2017] 4 CLJ 701. There is a presumption of constitutionality operating in favour of SOSMA. Hence, the Court of Appeal said that 'in the absence of any challenge and ruling on the constitutionality of SOSMA, it must be taken that SOSMA remains a valid piece of legislation' (at p 711 para 23).

[61] This decision was arrived at, although the Court of Appeal in *Khairuddin* ruled that s 124L does not come under a security offence of SOSMA in the absence of limb (c) and (d) of art 149 in the preamble of SOSMA. The case of *Mohamad Roslan bin Marjo v Public Prosecutor* [2019] 10 MLJ 104; [2019] 4 CLJ 648 Azhahari Kamal Ramli J equally followed *Khairuddin* on the principle of stare decisis where he said as follows:

> [22] In my opinion, the offence purportedly committed by the accused under s 26E is an act which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the federation or any part thereof ie, which falls under art 149(1)(e) of the Federal Constitution. As I have stated earlier in this decision, this paragraph has been expressly excluded in the recital of SOSMA which necessarily mean that this offence is not intended to be categorised as security offence. Hence, in answer to question (a) in this notice of motion, I rule that the 12 charges preferred against the accused came within the scope of art 149(1)(e) of the Federal Constitution and should not be treated as security offence.

[62] Although this court agreed that the facts in *Mohd Roslan bin Marjo* do not invite a different treatment or outcome when parties highlighted as follows:

> ... in the course of submission, learned counsel for the accused submitted that the learned Deputy Public Prosecutor has confirmed the fraudulent passports, the subject matter of the charges against the accused, were issued to Malaysians. The learned Deputy Public Prosecutor did not dispute this fact, hence the holder of these passports are Malaysian citizen.
>
> [21] As such, can the act of the accused in making those passports be considered as prejudicial to public order? With due respect, I do not think so. How could the issuance of the passport to Malaysian citizen tantamount to be a threat to public order. As submitted by learned counsel for the accused 'one cannot smuggle Malaysian migrant into Malaysia by issuing Malaysian passport because they are surely not 'migrant'. If I may add the definition of 'smuggling of migrant' under s. 2 of ATIPSOM involved an element of 'unlawful entry' into or through or unlawful exit from any country of which the person is not a citizen or permanent resident. Having being issued a travel document, albeit fraudulently, will not make a Malaysian citizen a smuggled migrant under ATIPSOM.

[63] The decision based on the facts in *Mohd Roslan bin Marjo* do not warrant the charges be categorised as security offence as the only available evidence was that the passports were issued to Malaysians not foreigner hence not a case of smuggling of migrants. However, for the outcome of the case to have a general application can be quite a concern.

[64] Be that as it may, coming back to this present case, with the constitutionality of SOSMA forming the background pillar, hence the s 13 provision must be construed to exist for a purpose.

[65] In *Lim Kian Aik v Public Prosecutor* [2021] 9 MLJ 633, this court had earlier decided that the case of *Khairuddin* was decided per incuriam as it did not ventilate on this important point put forward by the DPP. As recognised in *Khairuddin*, apart from action in (e), para (c) of art 149 of the Federal Constitution on 'to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence' was also missing from the SOSMA preamble.

[66] Does this mean that SOSMA was not intended to govern such offences or is para (f) wide enough to govern these two actions in paras (c) and (e) of art 149? The Court of Appeal was of the view that based on the Minister's statement in Parliament, SOSMA was enacted to combat terrorism.

[67] The position taken by this court that *Khairuddin* was decided per incuriam is based on the authority of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1, a decision by the Federal Court which stipulates as follows:

To recap, the relevant ratio decidendi in *Young v Bristol Aeroplane* is that there are three exceptions to the general rule that the Court of Appeal is bound by its own decisions or by decision of courts of co-ordinate jurisdiction such as the Court of Exchequer Chamber. The three exceptions are first, a decision of Court of Appeal given per incuriam need not be followed; secondly, when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one; thirdly it ought not to follow its own previous decision when it is expressly or by necessary implication, overruled by the House of Lords, or it cannot stand with a decision of the House of Lords. There are of course further possible exceptions in addition to the three exceptions in *Young v Bristol Aeroplane* when there may be cases the circumstances of which cry out for such new exceptions so long as they are not inconsistent with the three exceptions in *Young v Bristol Aeroplane*.

A few words need be said about a decision of Court of Appeal made per incuriam as mentioned above. The words 'per incuriam' are to be interpreted narrowly to mean as per Sir Raymond Evershed MR in *Morelle v Wakeling* [1955] 2 QB 379 at p 406 as a 'decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong'. It should be borne in mind that the year of *Morelle*'s case is 1955 whereas our s 3 of the Civil Law Act was enacted in 1956. The ratio in *Morelle*'s case is also part of the common law applicable to us.

[68] The absence of the Court of Appeal deliberation on this thus pushed this court to a conclusion that the decision in *Khairuddin*, that had omitted to address the pertinent point put forward by the DPP on para (f), thus was decided per incuriam and hence, it does not bar this court to further determine the issue as it arises in this case.

[69] To quote part of my judgment in *Lim Kian Aik* as follows:

45. The authorities above hence suggest that this Court is permitted to deal with the issue on para (f) of art 149 posed in *Khairuddin* but was not discussed by the Court of Appeal which may render the Court of Appeal decision as relevant but per incuriam. At least this is the view formed by this court that it was assumed then that para (f) has no application without deliberating on the point in the judgment. As SOSMA is quite a recent law enacted, and issues arising on the application and interpretation of the Act are now reaching the courts' ground, the meticulous determination by the apex courts on the submissions put forward by parties which are, from the parties' perspective seem to support the fact in issue, thus is crucial. This ensures the lower courts are guided in coming to their decision.

The intention and purpose of the Act: Why bar the suspect from bail

[70] The reason why SOSMA was enacted as its present form can be seen in the cases taking place at our own soil. It has been discussed in the judgment in

Lim Kian Aik v Public Prosecutor [2021] 9 MLJ 633 (of MTJ8 Shah Alam delivered on 14 December 2020) and is again repeated below.

[71] In *Lim Kian Aik*, the judgment highlighted as follows:

> 69. A step back in history, our Lahad Datu intrusion would be the best example to start with. It is no doubt a case of terrorist attack as charges were brought under s 121 and s 130KA of the Penal Code. But the concern is, as reflected in the facts carefully laid by the learned trial judge Stephen Chung Hian Guan J as follows:
>
> > [4.2.] On the way back to the river mouth at Kg. Tanduo PW2 (an auxiliary policeman stationed at Felda Sahabat, Lahad Datu), saw many foreigners at the surau at the kampung, some of them in camouflaged uniform. During the trial they were referred to as the armed intruders. Although, when some of the family members of the Sultan of the Sultanate of Sulu and North Borneo came to Sabah for visits, they and some of their supporters in Sabah were under police surveillance, the security forces (ie the police and armed forces) were caught unaware of the intrusion by the armed intruders at Kg Tanduo. *Either there was an intelligence failure or had underestimated the Sulu Sultanate*.

[72] Intelligence gathering is a paramount security measure of any nation. More often than not, intelligence gathering provides an avenue to thwart more complex and challenging terror threats. This court would believe that all Malaysians no doubt would equally agree with the former Prime Minister who said as follows:

> Our preparations are focused on information, intelligence. We must be able to identify, at an early stage, who a terrorist could be because he (or she) will be undergoing training or has close ties with terrorist groups.

[73] Security of a nation and not just Malaysia, all are dependent on this intelligence gathering. That is why certain laws are identified as a preventive law such as the Internal Security Act 1960 (now repealed). Otherwise, the absence of such laws, only to enable the availability of admissible evidence to facilitate charging these suspects in court, may only result in more serious injuries or loss of life or damage to property of a significant result, before the presence of such evidence that can be relied upon by the trial Courts. Massive damage would have result'.

[74] In *Velmurugan a/l Paniresilvam v Public Prosecutor* [2020] MLJU 1965 Mohd Radzi Harun J in dealing with a similar application for bail by the accused charged together with nine others, for being a member of one 'Kumpulan Viki Naidu', an organised criminal group, an offence under sub-s 130V(1) of the Penal Code where art 8 of the Federal Constitution was raised and the application of s 388(1) of the CPC in relation to this offence.

[75] The High Court in *Velmurugan* ruled that since the charge was one under SOSMA, s 13 of the said Act applies and not s 388 of the CPC.

CONCLUSION

[76] In the upshot, this court ruled that the court is not bound by the decision in *Saminathan* and *Koh Chin Wah* as ventilated above. With this basis forming the rationale and in the absence of any exceptions under s 13(2) of the SOSMA for this court to exercise its discretion, the application for bail is dismissed.

Appeal dismissed.

Reported by Michelle Yee